United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

NO. 75-4018

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-4018

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MARTIN A. GLEASON, INC. AND GUTTERMAN FUNERAL HOME, INC.,
Respondents.

No. 75-4045

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LOCAL 100, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,
Respondent.

No. 75-4047

J.N. GARLICK FUNERAL HOMES, INC., AND MARTIN A. GLEASON, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD AND LOCAL 100,
SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,
Respondents.

On Application for Enforcement and Petition for Review of
Two Orders of The National Labor Relations Board

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record considered as a whole supports the Board's finding that Martin A. Gleason, Inc. and Gutterman Funeral Home, Inc. violated Section 8(a)(1) and (3) of the National Labor Relations Act by locking out their unit employees and conditioning their return to work upon their resignation from the Union.

2. Whether substantial evidence on the record considered as a whole supports the Board's finding that Martin A. Gleason, Inc. violated Section 8(a)(1) of the Act by requesting its employees to provide copies of statements they gave to a Board agent during the investigation of this case.

3. Whether the Board properly approved, over the objection of charging party employers, a settlement stipulation entered into by the Board's General Counsel and the Union settling charges against the Union.

STATEMENT OF THE CASES

These cases, which have been consolidated in this Court[1] for purposes of briefing and argument, are before the Court as follows:

No. 75-4018

This case is before the Court upon application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Section 151, *et seq.*) for enforcement of its order (A. 47, 37-40)[2] issued on December 6, 1974, against Martin A. Gleason, Inc. and Gutterman Funeral Home, Inc. (hereafter "Gleason" and "Gutterman" respectively), said order of the Board[3] being reported at 215 NLRB No. 33.

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[1] On April 4, 1975 the Court approved the parties' stipulation for consolidation.

[2] "A." references are to the printed appendix. References preceding a semicolon are to the Board's Decision and Order; those following are to the supporting evidence.

[3] Chairman Miller and Members Fanning and Penello on the panel.

Nos. 75-4045 and 75-4047

No. 75-4045 is before the Court upon application of the National Labor Relations Board pursuant to Section 10(e) of the Act for enforcement of an unreported order (A. 163-165) of the Board[4] issued on January 21, 1975, approving a settlement stipulation (A. 138-146) entered into by the Board's General Counsel and charged party Local 100, Service Employees International Union, AFL-CIO (hereafter "the Union") over the objection of charging parties Gleason and J.N. Garlick Funeral Homes, Inc. (hereafter "Garlick"). In No. 75-4047 Gleason and Garlick petition for review of the Board's January 21st order. The Union, by its settlement stipulation, has waived all defenses to enforcement of the said Board order (A. 140).

This Court has jurisdiction, the unfair labor practices herein having occurred, *inter alia*, in New York, New York.

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found as follows:

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The Board found that Gleason and Gutterman violated Section 8(a)(1) and (3) of the Act by locking out their licensed funeral directors and conditioning their return to work upon their resignation from the Union. The Board also found that Gleason violated Section 8(a)(1) of the Act by requesting its employees to provide it with copies of statements they gave to a Board agent.

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[4] Members Jenkins and Penello; Member Kennedy, dissenting.

After reviewing the objections of charging parties Gleason and Garlick, the Board determined that a settlement agreement entered into by the Board's General Counsel and the charged party, the Union, fully remedied the allegations of the complaint, and that "it would effecutate the policies of the Act" to approve the settlement agreement. The Board therefore dismissed the charging parties' objections as lacking in merit.

A. Background; the Union strikes three Association Members

The latest collective bargaining agreement between the Union and the employers' Association to which Gleason and Gutterman belonged[5] expired on October 9, 1973 (A. 45, 6-7; 51, 60, 61).[6] On October 12 the Union called a strike against three of the approximately 32 Association members other than Gleason and Gutterman (A. 7; 51, 60, 61). The employer members of the Association agreed that they did not want to support a strike against any of their fellow members (A. 7; 109-110). However, the Association left to each member-employer the decision whether to lock out its unit employees, all licensed funeral directors, as a countermeasure (A. 45, 6, 7; 132- 133, 117-118, 93-95, 112-113). Eighteen Association members, involving 45 funeral establishments, locked out their unit employees; 14 members did not (A. 7; 131-132). The lockout continued for approximately 2 months, until a new collective bargaining agreement was reached (A. 8; 131).

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[5] This association, herein referred to as "the Association", is formally known as the Metropolitan Funeral Directors Association, Inc. (A. 6-7; 51, 60, 61).

[6] Unless otherwise noted, all dated hereinafter are in 1973.

B. Gleason locks out its unit employees and refuses to accept them back to work until they have resigned from the Union

On October 13, the day following the Union's call for a selective strike, President John Gleason of the Gleason funeral establishment called funeral director employees Albert Phillips, Robert Gallagher and Frank Connelly, Sr. together in his office after working hours (A. 8; 70-71, 95-96, 114, 117). Reading from a prepared text, Gleason told them that the Union had struck three Association members because of a bargaining impasse, that a strike against one Association member was a strike against all members, that "solidarity" required the other Association members to counter with a lockout of Union members as a defensive measure for the duration of the strike, and that as of the close of business that day all of Gleason's employees who belonged to the Union were suspended (A. 8; 71, 111-112, 114-115).[7] Employee Gallagher said that he did not want to be out of work and asked what his alternatives were, whether there was anything he could do to continue working (A. 8-9; 71). President Gleason replied that it was not his province to tell the men what to do that it "couldn't be discussed" because "If I tell you what to do, this is – something that would be . . . [an] impediment to the National Labor Relations Board" (A. 9-10; 97, 122).

Later that day employee Gallagher called President Gleason on the telephone to say again that he wanted to continue working, to which Gleason replied that he could not talk about it (A. 11; 97, 114-115). Gallagher then said that he disagreed with the Union's strike and that he

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[7] Gleason then employed four funeral directors, all of whom belonged to the Union (A. 8, n. 8; 95, 69, 78). The fourth employee, Frank Connelly, Jr., was not working that day but got the message from his father that evening, and President Gleason likewise informed him by telephone the following day (A. 8, n. 8; 70, 79).

wanted to get out of the Union (A. 11; 115). According to Gallagher, Gleason's immediate reply was, "as long as you brought it up, I can speak about it, if you don't want to belong to the union . . . if you want to sever your membership in the union . . . you can report to work" (A. 12; 115b). Gleason testified that when Gallagher said he would quit the Union Gleason repeated that he could not tell Gallagher "what to do" and only when Gallagher insisted that he had "made up his mind" did Gleason discuss the details of resignation which required Gallagher's sending a telegram to the Union and furnishing a copy thereof to Gleason as proof (A. 11-12; 98, 114b-114c).[8] Two days later Gallagher dispatched a telegram of resignation to the Union and gave a copy to President Gleason, who placed it in Gallagher's personnel file; Gallagher returned to work shortly thereafter (A. 12; 65, 96, 98, 99).

On the evening of October 13, the day on which President Gleason told his employees that they were suspended, Shop Steward Albert Phillips called President Gleason (A. 12, and n. 13; 100, 109, 119-120). According to Gleason's testimony, Phillips told Gleason that he wanted to return to work and that he had decided to resign from the Union (A. 12; 100). Gleason's response to Phillips was "I can't tell you what to do" (A. 14, 12; 100). According to Gleason, Phillips then asked what would happen if he sent a telegram to the Union resigning his membership (A. 13; 100-101). Gleason replied that Phillips "would have to show [Gleason] a copy" of the telegram "to establish the fact that he did resign" because "I wouldn't accept him back unless he showed me a telegram" (A. 15, 16; 102, 103, 104).[9] Phillips sent his telegram of resignation to the

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[8] The Board found it unnecessary to resolve this difference in testimony, as the difference was immaterial to the issue formulated before the Board (A. 26, 31-32).

[9] Employee Phillips testified that when he told President Gleason he wanted to come back to work, Gleason said "well, do you know what you have to do?" and

(continued)

Union the following day, October 14, and reported to work with a receipt from Western Union (A. 17; 65, 105, 120). Gleason at first refused to accept anything less than a copy of the telegram itself as a condition of Phillips' return to work, but ultimately settled for a certification by Phillips of its contents and a certification from Western Union that the telegram had been sent, which he placed in Phillips' personnel file (A. 17-18; 105, 106).[10] Gallagher and Phillips continued to work for Gleason throughout the lockout (A. 106).

Frank Connelly, Jr., the employee who had not been at the October 13 meeting but who had been advised of the lockout by Gleason's telephone call on October 14, arranged to meet on October 15 with Gleason, Union Representative Benson and employee Frank Connelly, Sr. (A. 18; 80). During the course of the telephone conversation to arrange the meeting, according to Connelly's undenied testimony,[11] he asked Gleason what alternative he had to being locked out, and Gleason replied that the only thing Connelly could do would be to resign from the Union. When Connelly asked Gleason what would happen to him if he resigned, Gleason answered that he would not suffer because any contract thereafter concluded would contain a no-recrimination clause (A. 18; 80-81).

The two Connellys later went to Gleason's office to meet with him and Union Representative Benson (A. 18; 72-73). According to Connelly,

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9 (continued) Phillips replied "Yes, I do. I believe I have to sever myself" from the Union, and further told Gleason that he would do so by sending a telegram of resignation to the Union (A. 16-17; 119, 121-122). The Board did not find it necessary to resolve any testimonial discrepancies surrounding this conversation as the difference was immaterial to the issue formulated before the Board (A. 26, 31-32).

10 At the hearing before Administrative Law Judge Herman, Phillips was called by and testified on behalf of Gleason (A. 116).

11 Gleason offered no evidence regarding this telephone conversation with employee Frank Connelly, Jr. (A. 22).

Jr., before Benson arrived the two Connellys asked President Gleason "if there wasn't possibly a way of [going back to work] without resignation from the Union" (A. 18-19; 81). Gleason responded that if Connelly did not resign he could not work (A. 20-21; 85). Neither Connelly, Jr. nor Connelly, Sr. resigned from the Union; both returned to work in December following the Union's ratification of the proposed bargaining agreement (A. 72-74, 86).

C. Gutterman tells its Union employees that they cannot continue to work by direction of the Association

About 1:00 a.m. on the morning of October 14, less than 48 hours following the Union's selective strike vote, funeral director employees Frank Marinaro and August Tolomie returned to Gutterman's Manhattan location after completing a removal (A. 22; 89, 134-135). Michael Gutterman, Secretary of the Gutterman funeral operation, called employees Marinaro and Tolomie into the back office and told them that he was following directions from the Association and "no members of the local can continue to work," that "no members of Local 100 would be allowed to work" (A. 22-23; 89, 51, 61, 125, 127-128, 130). Michael Gutterman said that he hoped there would be "no hard feelings," that this was similar to the strike action taken 3 years previously by all the Union employees, and accepted Shop Steward Marinaro's offer to notify Gutterman's other unit employees that they could not work (A. 23; 89, 92, 126, 128). The employees reported this conversation to the Union, but did not resign from the Union (A. 23).[12]

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[12] Although Michael Gutterman denied at the hearing below that anyone had mentioned resignation from the Union at that meeting (A. 23), Marinaro and Tolomie both testified that Michael Gutterman told them on advice of counsel that if they wanted to return to work they would have to notify the Union of their resignation

(continued)

D. Gleason requests each of its four unit employees to provide copies of statements each gave to the Board during the investigation of this case

On February 11, 1974, shortly after the Board issued its complaint herein against Gleason and Gutterman, President John Gleason summoned employee Frank Connelly, Sr. into his office, told Connelly that he would like a copy of the affidavit Connelly had recently given to the Board, and asked Connelly if he would object to getting Gleason a copy (A. 22; 74-75, 77). Connelly replied that he had no objection, and within a few hours sat down at Gleason's typewriter and wrote the Board's Regional Office requesting a copy of his statement and adding the following paragraph (A. 22, n. 15; 62, 74-75, 77):

> I am doing this at the request of my employer. I would like to ask you if this will jeopardize my position in this matter. I don't believe that it will but I want to be sure. If you consider this hazardous please advise me.

President Gleason pursued essentially the same course of action individually with each of his other unit employees, Phillips, Gallagher and Connelly, Jr. Each complied with Gleason's request after obtaining a copy of the statement from the Board's Regional Office (A. 22; 116, 120-121, 64, 86-88).

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12 (continued) in writing (A. 24 n. 18; 135, 89, 191); that they would rejoin the Union after settlement of the dispute; and that when Shop Steward Marinaro asked if Gutterman would compensate them for any fine imposed by the Union, Gutterman replied that there would be no fine (A. 23; 89, 91, 135). The Board found it unnecessary to resolve the differences in this testimony (A. 27).

E. The Board approves, over the objection of charging party employers, a settlement stipulation entered into by the Board's General Counsel and the Union settling charges against the Union

1. Background

On March 13, 1974, six weeks after complaint had issued against Gleason and Gutterman on the facts set forth above, Gleason and Garlick, another funeral home, filed separate unfair labor practice charges with the Board's Regional Office alleging that the Union had violated Section 8(b)(1)(A) of the Act by restraining employees in the exercise of their Section 7 rights (A. 138-139). Based on those charges, the Regional Director issued a consolidated complaint on July 24, 1974, alleging that the Union had told Gleason's and Garlick's employees during the October strike and lockout that the Union would not accept resignations and that the Union had threatened to fine or otherwise penalize employees who sought to resign or return to work during the strike or refused to perform picket line duties, all in violation of Section 8(b)(1)(A) of the Act (A. 139, 141-142). A hearing before Administrative Law Judge Singer was scheduled for August 27, 1974.

2. The settlement proceedings

During the week prior to the scheduled August 27 hearing, Counsel for the Board's General Counsel advised counsel for Gleason and Garlick that there was a strong possibility that the matter would be resolved (Memorandum of Law in Support of Charging Parties' Exceptions to the Decision of the Administrative Law Judge, p. 2). Thereafter, about August 26, 1974, the Union and counsel for the Board's General Counsel entered a formal settlement stipulation subject to Board approval settling the charges filed by Gleason and Garlick against the Union (A. 138-146).

At the outset of the hearing on August 27, 1974, counsel for the Board's General Counsel moved for approval of said settlement stipulation, which contained a broad order providing for entry of Board and Court orders (1) requiring the Union to cease and desist from coercing not only Gleason's and Garlick's employees but also those of "any other employer" and not only through the acts and conduct alleged but also "in any other manner" violative of Section 7 of the Act, and (2) affirmatively requiring the Union to post an appropriate notice, to furnish signed copies of the notice for posting at the affected employers, and to notify the Regional Director in writing within 10 days what steps had been taken in compliance therewith (A. 141-142). The proposed stipulation also provided that the signing of the stipulation by the Union would not constitute an admission that the Union had violated the Act (A. 143); that the stipulation was subject in full to approval by the Board (A. 143); and that the Union, by signing said stipulation, waived all further proceedings before the Board and defenses before the Court (A. 142-143, 160).

At the hearing before Administrative Law Judge Singer, all parties were afforded full opportunity to be heard – General Counsel in support of the settlement stipulation and Gleason and Garlick objecting to inclusion of the non-admission clause and contending that the proposed order did not fully remedy the alleged violations because it did not provide for backpay (A. 148). In addition, Gleason and Garlick subsequently filed a joint memorandum in further support of their positions (A. 148). On October 31, 1974 Judge Singer issued his decision overruling Gleason's and Garlick's objections and granting the General Counsel's motion for approval of the stipulation (A. 147-159). On the same date, the proceeding was transferred to and continued before the Board (A. 161, n. 1). Thereafter, Gleason and Garlick filed exceptions and a supporting memorandum (A. 161-162, n. 1).

II. THE BOARD'S DECISION AND ORDER

A. No. 75-4018

On the foregoing facts the Board found that Gleason and Gutterman violated Section 8(a)(1) and (3) of the Act by locking out their licensed funeral directors and conditioning their return to work upon their resignation from the Union, and that Gleason violated Section 8(a)(1) of the Act by requesting its employees to supply copies of statements they gave to the Board during the investigation of this case (A. 45, 36).[13]

The Board's order requires Gleason and Gutterman to cease and desist from the violations found and from any like or related conduct interfering with their employees' exercise of their Section 7 rights. Affirmatively, the Board's order requires the two employers to make whole their locked out employees for any loss of earnings suffered as a result of their employers' discrimination against them, and to post appropriate notices (A. 47, 37-44).[14]

B. Nos. 75-4045 and 75-4047

After reviewing Gleason's and Garlick's objections to the proposed stipulation, the Board determined that the stipulation, by providing for entry of a formal Board order and consent court judgment, fully remedied

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[13] Chairman Miller dissented from the Board's finding that Gleason's requests for statements violated the Act (A. 45-46, n. 2).

[14] The Board dismissed in its entirety the complaint against Walter B. Cooke, Inc. (A. 47).

the allegations of the complaint (A. 160).[15] The Board therefore dismissed the employers' objections as lacking in merit, found "that it would effectuate the policies of the Act to approve the Stipulation," and entered the order provided for in the Stipulation (A. 162 n. 1, 163-165).[16]

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[15] Member Kennedy dissented for the reasons set forth in his dissent in *Union de Tronquistas de Puerto Rico, Local 901, etc. (Lock Joint Pipe & Co. of Puerto Rico)*, 202 NLRB 399 (A. 165).

[16] In addition to requiring the posting of appropriate notices, the Board's order requires the Union to cease and desist from the following (A. 163-164):

> (a) Stating to employees of J.N. Garlick Funeral Homes, Inc., Martin A. Gleason, Inc., or any other employer, that Local 100 will not accept resignations, or threatening employees with fines or other penalties if said employees resign, tender resignations or seek to resign from Local 100, except insofar as Respondent is entitled to inform employees of their obligations pursuant to a valid agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.
>
> (b) Threatening employees with fines or other penalties if said employees resign, tender resignations or seek to resign from Local 100 and fail to [sic] refuse to do picket line duty at the premises of J.N. Garlick Funeral Homes, Inc., Martin A. Gleason, Inc., or any other employer.
>
> (c) Threatening employees with fines or other penalties if said employees resign, tender resignations or seek to resign from Local 100 and return to work during a concerted work stoppage or lockout.
>
> (d) In any other manner, coercing or restraining employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT GLEASON AND GUTTERMAN VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY LOCKING OUT THEIR UNIT EMPLOYEES AND CONDITIONING THEIR RETURN TO WORK UPON THEIR RESIGNATION FROM THE UNION

A. The Applicable Legal Principles

In *Buffalo Linen (N.L.R.B. v. Truck Drivers Local Union,* 353 U.S. 87 (1957)), the Supreme Court held that, in the absence of specific proof of unlawful motivation, the use of a lockout by all of the non-struck members of a multi-employer bargaining association as a defense to a "whipsaw" strike which "imperiled the employers' common interest in bargaining on a group basis" did not violate either Section 8(a)(1) or Section 8(a)(3) of the Act. 353 U.S. at 89, 97. The Court noted that, although the lockout tended to impair the effectiveness of the whipsaw strike, the right to strike

> is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide. [Footnote omitted]. Conflict may arise, for example, between the right to strike and the interest of small employers in preserving multi-employer bargaining as a means of bargaining on an equal basis with a large union and avoiding the competitive disadvantages resulting from nonuniform contractual terms. The ultimate problem is the balancing of the conflicting legitimate interests. 353 U.S. at 96.

The Court concluded that the Board had correctly balanced those interests in upholding the lockout since the nonstruck employers resorted to the lockout to preserve the multi-employer bargaining unit from the disintegration threatened by the whipsaw strike. 353 U.S. at 97.

In *N.L.R.B. v. Brown*, 380 U.S. 278 (1965), the Court ruled that the non-struck employers of a multi-employer bargaining association did not violate Section 8(a)(1) and (3) of the Act by locking out employees in response to a whipsaw strike and by thereafter using temporary replacements to maintain operations in competition with the struck employer, who also used temporary replacements. Acknowledging that "the use of temporary nonunion personnel in preference to the locked-out union members is discriminatory," the Court nevertheless concluded that "any resulting tendency to discourage union membership is comparatively remote" and that the use of temporary replacements constituted a "measure reasonably adapted to the effectuation of a legitimate business end," namely, "preserving the integrity of the multi-employer bargaining unit." 380 U.S. at 288, 289.

In *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300, 318 (1965), decided the same day as *Brown*, the Court ruled that a single employer "violates neither Section 8(a)(1) nor 8(a)(3) when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position." In so holding, the Court specifically noted that the use of the lockout there did not "carry with it any necessary implication that the employer acted to discourage union membership or otherwise discriminate against union members as such. . . . There is no claim that the employer locked out only union members, or locked out any employee simply because he was a union member; nor is it alleged that the employer conditioned rehiring upon resignation from the union." 380 U.S. at 312.

In *N.L.R.B. v. Great Dane Trailers*, 388 U.S. 26 (1967), the Supreme Court, distilling principles gleaned from *Brown*, *American Ship Building* and other decisions, constructed an analytical framework within which to test the lawfulness of employer conduct. Thus, the Court articulated two

categories of employer conduct which violate Sections 8(a)(1) and (3) of the Act without regard to anti-union animus. First, employer conduct which is "inherently destructive" of important employee rights is an unfair labor practice "even if the employer introduces evidence that the conduct was motivated by business considerations" (388 U.S. at 34). Such conduct bears "its own indicia of intent" and may be deemed proscribed even in the absence of specific evidence of an anti-union motivation. *Radio Officers v. N.L.R.B.*, 347 U.S. 17, 44-45 (1954); *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 228, 231 (1963). See *Welch Scientific Company v. N.L.R.B.*, 340 F.2d 199, 203 (C.A. 2, 1965). Second, employer conduct which has only a "comparatively slight" impact on the rights of employees will also be deemed an unfair labor practice unless the employer introduces evidence of "legitimate and substantial business justifications for the conduct" *(ibid.)*. If the employer is able to demonstrate substantial reasons to justify his conduct, then it becomes necessary "to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." *N.L.R.B. v. Great Dane Trailers, supra*, 388 U.S. at 33-34. See *Inter-Collegiate Press, Graphic Arts Div. v. N.L.R.B.*, 486 F.2d 837, 840-842 and n. 8 (C.A. 8, 1973). See also, *Lane v. N.L.R.B. (Darling & Co.)*, 418 F.2d 1208, 1211 (C.A.D.C., 1969).[17]

Thus, the initial consideration is "the degree to which the challenged conduct might have affected employee rights. . . ." *Great Dane Trailers, supra*, 388 U.S. at 34. Conduct "inherently destructive" of important employee rights is illegal despite a claim of "overriding business purpose pursued in good faith," whereas conduct having a "comparatively slight"

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[17] And as the Court recongized in *N.L.R.B. v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967), "[i]t is the primary responsibility of the Board and not of the courts . . ." to strike the balance. See also, *Laclede Gas Co. v. N.L.R.B.*, 421 F.2d 610, 616-618 (C.A. 8, 1970).

tendency to harm employee rights may be justified as "reasonably adapted" to achieve an employer's countervailing and substantial "legitimate business ends." *N.L.R.B. v. Brown, supra,* 380 U.S. at 287-288. Accord: *N.L.R.B. v. Great Dane Trailers, supra; N.L.R.B. v. Erie Resistor Corp., supra; N.L.R.B. v. Duncan Foundry & Machine Works,* 435 F.2d 612 (C. A. 7, 1970).

Applying these principles, as we now show, the Board properly found that by locking out the unit employees and conditioning their return to work on resignation from the Union, Gleason and Gutterman engaged in conduct which, if not "inherently destructive" of important employee rights, was at least calculated to interfere substantially with employee rights and discourage union membership without any "reasonable adaptation" to achieve a legitimate business purpose.

B. Gleason's and Gutterman's conduct was, if not "inherently destructive" of important employee rights, at least such as to substantially interfere with those employee rights and discourage union membership without any "reasonable adaptation" to achieve a legitimate business purpose

As shown in the Statement, three days after the expiration of the latest collective bargaining agreement the Union called a selective strike against three of the employer Association members other than Gleason and Gutterman. The Association adopted a "hands-off" position: while it did not support a strike against any of its members, it would leave to each member employer the decision whether to lock out its employees as a countermeasure. Slightly more than one-half the Association's members, among them Gleason and Gutterman, locked out their employees; the rest did not. In addition, however, Gleason and Gutterman conditioned lifting the lockout on the resignation of their union employees from the Union.

Thus, President Gleason called all three of his unit employees then on duty to his office, told them that "solidarity" against the Union's strike required other Association members to counter with a lockout, and thus that all unit employees were suspended from working. When employee Gallagher pleaded that he did not want to be out of work and asked what his alternatives were, Gleason replied that he "couldn't tell the men what to do," that it "couldn't be discussed" because "that would be . . . [an] impediment to the National Labor Relations Board" (A. 97, 122). When later that same day Gallagher called Gleason in a further effort to keep his job, Gleason, as he admitted on the witness stand, discussed with Gallagher the details of his resignation from the Union which required Gallagher's sending a telegram to the Union with a copy to Gleason as proof that he had resigned. Later that same evening, when Shop Steward Phillips called Gleason in an effort to retain his job, Gleason told Phillips that he would have to show Gleason a copy of his telegram of resignation to the Union "to establish the fact" that he had resigned because Gleason "wouldn't accept him back unless he showed [Gleason] a telegram" (A. 102-104). Both Gallagher and Shop Steward Phillips resigned shortly thereafter, and were re-accepted by Gleason at work only upon production of the proper documents evidencing resignation. The next day, in a conversation with employee Frank Connelly, Jr., who had not been present when Gleason met with the other three unit employees, Gleason indicated that the only thing Connelly could do to return to work would be to resign from the Union.

Gutterman's actions in response to the Union's strike and the Association's "hands-off" policy are much less detailed than Gleason's, but are equally egregious. Within 48 hours of the Union's strike vote, Secretary Michael Gutterman called the two unit employees on duty, one of whom was the Union's shop steward, into the back office and told them that,

following the direction of the Association, "no members of the local" could continue to work for Gutterman's and that he hoped there would be no hard feelings. He told them that this was at the direction of the negotiating committee of which both Gutterman and Gleason were members. Both employees reported this conversation to their Union; neither resigned.

We show below that on these facts, the Board properly found that Gleason's lockout of its unit employees and conditioning their return to work on Union resignation was violative of the Act (A. 45, 25-26, 36) and also properly found that Gutterman's lockout and accompanying announcement that "no members of the local" could work, while perhaps more subtle than a direct invitation to quit the Union, nevertheless had the same impact and likewise violated the Act (A. 45, 26-27, 36).

Noting *Buffalo Linen's* recognition that "the balancing of the conflicting legitimate interests . . . is often a difficult and delicate responsibility" (A. 29), the Board followed the Supreme Court's analysis in *N.L.R.B. v. Brown, supra.* In *Brown* the Supreme Court was faced with a union strike of Food Jet, a retail food store, during negotiations for a new bargaining agreement. All of the other four employer-members of the multi-employer bargaining unit, who had previously told the union that a strike against one of them "would be regarded as a strike against all," immediately locked out their unit employees; the struck store and all the other stores then carried on business with temporary replacements. 380 U.S. at 916. The Court began its analysis with the proposition that, in the absence of proof of unlawful motivation, there are many economic weapons which an employer may lawfully use that in some degree interfere with concerted employee activities or discourage union membership, including locking out his employees after impasse solely to bring pressure to bear in support of his bargaining position. 380 U.S. at 283-284. The

Court then continued

> In the circumstances of this case, we do not see how the continued operations of respondents and their use of temporary replacements imply hostile motivation any more than the lockout itself; nor do we see how they are inherently more destructive of employee rights. Rather, the compelling inference is that this was all part and parcel of respondents' defensive measure to preserve the multi-employer group in the face of the whipsaw strike. Since Food Jet legitimately continued business operations, it is only reasonable to regard respondents' action as evincing concern that the integrity of the employer group was threatened unless they also managed to stay open for business during the lockout. . . . The retail food industry is very competitive and repetitive patronage is highly important. Faced with the prospect of a loss of patronage to Food Jet, it is logical that respondents should have been concerned that one or more of their number might bolt the group and come to terms with the Local, thus destroying the common front essential to multi-employer bargaining. . . . Clearly respondents' continued operations with the use of temporary replacements following the lockout were wholly consistent with a legitimate business purpose. [380 U.S. at 284.]

The Court further found in *Brown* that any discontent on the part of union members "in all likelihood is attributable largely" to the admittedly legal lockout, and that that portion of discontent attributable to the employers' use of nonunion temporary replacements was "comparatively insubstantial." Thus, the Court in *Brown* held that the employers' lockout and replacement of employees by nonunion personnel, though discriminatory, was justified because "any resulting tendency to discourage union membership was comparatively remote" in light of the employers' use of a "measure reasonably adapted to the achievement of a legitimate end – preserving the integrity of the multi-employer bargaining unit." 380 U.S. at 288, 289.

Gleason and Gutterman have not shown any business necessity for conditioning the use of a lockout upon the resignation of the employees from the Union except for the assertion that their conduct was a "defensive counteraction" against the Union's strike (See p. 26, n. 26, *infra*) sanctioned under *Brown*. However, it is clear that in applying the Supreme Court's analysis in *Brown*, the Board here properly reached an opposite result based on the significantly different facts of this case. First, the Court in *Brown* held the initial lockout there was legal in that its aim was to preserve the threatened integrity of the multi-employer bargaining group. Here, the Board found that the employers' conduct "undermine[d] any contention" that it was "reasonably adapted" to effectuate a legitimate business end. Secondly, the Court in *Brown* found that the use of nonunion temporary replacements, though discriminatory, was tolerable because its effect on employee rights was "insubstantial" and "remote" when added to the existing effect of the justified initial lockout preserving the competitive rights of the nonstruck employers. Here, the Board found that the employers' conduct directly, substantially and gravely interfered with protected employee rights in ways which were not presented in *Brown*. For both of these reasons, the Board distinguished *Brown* and found that the conduct herein was unlawful.

Gleason's and Gutterman's lockout and simultaneous conditioning of job eligibility on withdrawal from the Union does not serve any legitimate business purpose. Respondents concede (A. 131-133) that their multi-employer association had *not* taken a strong stand of "solidarity" in the face of the Union's whipsaw strike. Rather, the Association simply left it up to each individual member to lock out as it saw fit. While some 18 member employers did lock out their employees, fourteen member employers, with full Association approval, did not. In the Association's view, then, the Union's strike against one of its members did *not* call for

presenting a united front of "solidarity" in the form of a sanctioned lockout. Since the Association members elected to be fragmented in their stance against the Union in this instance, there simply was no solidarity, no "integrity of the multi-employer bargaining unit" to be "preserved." Thus, the specific "legitimate business end" which justified the multi-employer lockouts in both *Buffalo Linen, supra,* and *Brown, supra,* is totally absent in the case at bar.

Moreover, the conduct here was significantly more destructive of employee rights than that approved in *Brown.* It is hard to imagine a more openly coercive example than the facts presented here of employer contravention of the cornerstone policy of the Act, which is "to insulate employees' jobs from their organizational rights.'" *Scofield v. N.L.R.B.*, 394 U.S. 423, 429, n. 5 (1969), quoting *Radio Officers' Union v. N.L.R.B., supra,* 347 U.S. at 40. Here Gleason and Gutterman used their control over the employment relationship as a lever to influence their employees' exercise of basic statutory rights, contrary to the interest of the Act, which "leaves the adjustment of industrial relations to the free play of economic forces but seeks to assure that the play of those forces be truly free." *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 183 (1941). See also, *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 678, 685-687 (1944).

As the Board indicated (A. 29, 45), in addition to the immediate effect of employer-required union resignations on union solidarity behind a strike, "other natural and foreseeable consequences thereof" may reasonably be expected to survive the end of the strike. First, whereas the temporary hiring of strangers might well tend to solidify the union's ranks both during and after the strike, employees who resign are likely

to return to the union after the strike[18] with a diminished loyalty to the union.[19] Secondly, employee resignations during a strike set the stage for internal union dissension.[20] That the employees were in fact quite concerned about possible recriminations from the Union is clearly manifested by their references to being "accepted back into the Union" and to being fined for their resignations (A. 71-72, 89, 91, 135).

Such employer conduct might well be deemed "inherently destructive" of important employee interests.[21] Inherently destructive conduct is presented where an employer discharges strikers because they have engaged in collective action,[22] where an employer permanently discharges his unionized staff and replaces them with employees known to be violently anti-union,[23] or where, as in *N.L.R.B. v. Erie Resistor Corp., supra,* an employer grants super-seniority to non-striking employees. As the Court in *Erie Resistor* stated (373 U.S. at 231):

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18 Assuming, as here, a union-security clause requiring them to be members of the Union (A. 112).

19 As the Board noted (A. 30, n. 30), Section 8(a)(3) proscribes conduct designed to discourage "good" union membership as well as "adhesion to union membership." *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 39-40 (1954). Accord: *N.L.R.B. v. Brown, supra,* 380 U.S. at 287; *N.L.R.B. v. Erie Resistor Corp., supra,* 373 U.S. at 231. See *Lockouts – Employer's Lockout with Temporary Replacements is an Unfair Labor Practice*, 85 Harv. L. Rev. 680, 687 (1972).

20 Cf. *Booster Lodge No. 405, IAM v. N.L.R.B.*, 412 U.S. 84 (1973); *N.L.R.B. v. Granite State Joint Board*, 409 U.S. 213 (1972); *Scofield v. N.L.R.B.*, 394 U.S. 423, 430 (1969); *Allis-Chalmers Mfg. Co. v. N.L.R.B.*, 388 U.S. 175 (1967).

21 As discussed above, conduct deemed "inherently destructive" of important Section 7 rights may be found unlawful "even if the employer introduces evidence that the conduct was motivated by business considerations." *Great Dane, supra,* 388 U.S. at 34.

22 E.g., *N.L.R.B. v. MacKay Radio and Telegraph Co.*, 304 U.S. 333, 345-346 (1938).

23 E.g., *American Ship Building Co. v. N.L.R.B., supra,* 380 U.S. at 309.

> [T]he plan here creates a cleavage in the plant continuing long after the strike is ended. Employees are henceforth divided into two camps: those who stayed with the union and those who returned before the end of the strike and thereby gained extra seniority. This breach is reemphasized with each subsequent layoff and stands as an ever-present reminder of the dangers connected with striking and with union activities in general.

Under the rationale of *Erie Resistor*, employer conduct which, though taken in the name of countering the union's economic pressure, creates "persisting impediments to the union's ability to recover and reorganize for further confrontation"[24] falls in the category of conduct "inherently prejudicial" to important employee rights. As we have shown, a union's future stability is clearly jeopardized by an employer's requiring union resignation as a condition of employment. Moreover, even if such conduct is not inherently destructive of employee rights, its use as a "defensive counteraction" is not, on balance, an appropriate business justification for the serious infringement of employee rights occasioned here. Cf. *N.L.R.B. v. Fleetwood Trailer Co.*, 389 U.S. 375, 378-381 (1967).

Before the Board, Gleason and Gutterman primarily defended their lockout and related actions by attempting to demonstrate that the employers' conduct here was akin to that approved by the Supreme Court in *Brown*. As we have shown, *supra*, that effort is to no avail. Additionally, the employers alleged before the Board that their "demonstrable lack of Union animus" was significant and that they had "the right to exert maximum financial pressure on the Union." These remaining contentions are without merit, as we now show.

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[24] *Lockouts – Employer's Lockout with Temporary Replacements is an Unfair Labor Practice*, 85 Harv. L. Rev. 680, 687 (1972).

Gleason's and Gutterman's reliance on their lack of motive to destroy the Union, evidenced by their long bargaining history and their continued negotiations with the Union after the lockout, is simply misplaced. The Board here did *not* find and does not now rely on any indicia that the employers' *subjective motivation* was illegal. Rather, as set forth above, the Board found that regardless of their subjective motivation, the employers' conduct constituted an intolerable encroachment on important employee rights, an encroachment which could not be excused as "reasonably adapted" to the pursuit of any legitimate business consideration.[25]

Nor may Gleason and Gutterman avail themselves of an asserted "right" to exert maximum financial pressure on the Union here. The Board specifically rejected this defense as "not grounded on the record", finding that since there is no credible evidence that either Gleason or Gutterman entertained any reason other than "defensive counteraction," as explained to their employees, they may not rely on any other reasons

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[25] Gutterman sought to excuse its directive to its employees that "no members of the local" could work on grounds, *inter alia*, that Gutterman was not subjectively seeking to get its employees to resign. However, as the Board found (A. 26-27), "[w]hile perhaps more subtle than a direct invitation to quit the Union, the statement's plain impact was that non-members of the Union could work. Hence, the Company's contention that the reference to members is not significant is less than compelling. If non-members could work, resignation was the remedy." Gutterman, a fellow member with Gleason on the employers' negotiating committee, told his employees that his actions were taken at the "direction" of the Association. Gleason's illegal lockout, also taken under the aegis of the Association, had already occurred, and it was common knowledge that some of Gleason's locked out employees had returned to work after telegraphing their resignations to the Union. Indeed, a corporate official of Walter B. Cooke, Inc., another funeral home employer, admitted that he had heard of Gleason's employees' resignations the day after they occurred (A. 26). These circumstances evidence substantial support for the Board's findings that Gutterman violated the Act by locking out its employees and conditioning their return to work on resignation from the Union.

now. Cf. *N.L.R.B. v. Great Dane Trailers, Inc., supra,* 388 U.S. 26, 34-35 (A. 32-33 n. 37, 45).[26]

In any event, to the extent that Gleason and Gutterman assert that their conduct was simply an offensive lockout sanctioned under *American Ship Building Co. v. N.L.R.B., supra,* 380 U.S. 300, this defense is without merit. For *American Ship* offers no support for the Companies' position here. In *American Ship,* the Supreme Court found that economic pressure in support of a bargaining position was "the sole purpose" of the lockout there, specifically noting that the employer had not acted to discourage union membership since there was "no claim that the employer locked out only union members, or locked out any employee simply because he was a union member; nor is it alleged that the employer conditioned rehiring upon resignation from the union." (*Id.* at 312).

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[26] Both Gleason and Gutterman repeatedly testified to their having informed their employees that the lockouts were only "defensive counteractions," and Gleason's testimony in this respect was corroborated by his two employee witnesses, Gallagher and Phillips (A. 32-33 n. 37; 109, 111, 127, 128, 129-130). The sole variance was President Gleason's testimony, when recalled to the stand after ample opportunity to consult with counsel about his earlier testimony. In answer to the question whether he had had any motive other "than the one you testified about earlier," he stated (A. 124):

> You know, come to think of it, my mind is a little more refreshed in that regard, we were motivated to lock out the employees first in support of our members. And then also to bring an economic pressure upon the Union in that regard.

The Board discredited this testimony as "completely fabricated and entirely at odds with all the earlier testimony" (A. 33 n. 37). Insofar as Gleason and Gutterman here attack credibility resolutions made by the Administrative Law Judge, the record does not reflect "that the Board's approval of the [Judge's] evaluation of certain testimony as reliable and other testimony as not reliable is on its facts 'hopelessly incredible.'" *N.L.R.B. v. Langenbacher Co.,* 398 F.2d 459, 462 (C.A. 2, 1968), cert. denied, 393 U.S. 1049. This Court has long held that "questions of credibility are for the [Administrative Law Judge] and the Board." *N.L.R.B. v. L.E. Farrell Co.,* 360 F.2d 205, 207 (C.A. 2, 1966). Accord: *N.L.R.B. v. Milco, Inc.,* 388 F.2d 133, 136 (C.A. 2, 1968); *N.L.R.B. v. Warrensburg Board & Paper Corp.,* 340 F.2d 920, 922 (C.A. 2, 1965).

In contrast, the claim absent in *American Ship* is exactly the claim that is present here – and Gleason and Gutterman's lockout and simultaneous conditioning of the employees' return upon resignation from the Union hardly qualifies as only "remotely" affecting the employees' protected rights. For, as the Board indicated (A. 29, 45), "where resignation from the union, even just for the duration of the strike, becomes the price for keeping one's job during that period," such resignations have the "direct and immediate effect" of diminishing employee support for the strike.[27]

In sum, Gleason and Gutterman have here demonstrated, by their lockout and simultaneous conditioning of rehire upon their employees' union resignation, conduct which could well be considered "inherently destructive" of vital employee rights. However, even if Gleason's and Gutterman's conduct was not "inherently destructive" of employee rights, it clearly was significantly destructive of those rights and without any substantial countervailing business consideration.

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[27] Gleason's and Gutterman's conduct here is easily distinguished from the employers' conduct in *Inter-Collegiate Press, Graphic Arts Div. v. N.L.R.B., supra*, 486 F.2d at 843-846, and in *Ottawa Silica Company, Inc. v. N.L.R.B.*, 482 F.2d 945 (C. A. 6, 1973), cert. denied, 415 U.S. 916. In each case, the Board found that the employer's lockout was lawful; the question was the legality of its subsequent use of temporary replacements who, unlike here, were new employees. In each case, the employer showed that its need to remain open for business with the help of temporary replacements was a measure "reasonably adapted" to the achievement of a legitimate business end; and, in each case, the Board found that such business ends outweighed the tendency to discourage union membership.

II. SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT GLEASON VIOLATED SECTION 8(a)(1) OF THE ACT BY REQUESTING ALL OF ITS EMPLOYEES WHO WERE UNION MEMBERS TO PROVIDE IT WITH COPIES OF STATEMENTS THEY GAVE TO A BOARD AGENT DURING THE INVESTIGATION OF THIS CASE

As shown in the Statement, in mid-October 1973, employer Gleason locked out all four unit employees in response to the Union's selective strike and required as a condition of his employees' return to work that they resign their union membership. Two of the four employees paid the price demanded by employer Gleason, resigning their union membership in order to return to work.[28] The other two employees bore the brunt of the lockout for its two-month duration and returned to work in mid-December 1973.[29] As we have shown (*supra*, pp. 14-27), Gleason's actions in locking out all of its Union employees and conditioning their return to work amounted to serious unfair labor practices in and of themselves.

It was in this context that on or about February 11, 1974, a scant two months after the lockout was terminated and all of Gleason's unit employees were back at work, employer Gleason called each of his four employees into his office individually and asked each one if he "would mind" supplying Gleason with a copy of the statement he had given to the Board during the investigation of this case. Gleason indicated that he was "not requiring" this action. Three of the employees wrote to the Board's Regional Office, obtained copies of their statements, and turned them over to Gleason. The fourth employee, Connelly, Sr., initially expressed hesitancy about "jeopardizing my position in this matter" but nevertheless obtained a copy of his statement from the Board and turned it over to Gleason (*supra*, p. 9).

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[28] Employees Gallagher and Phillips, the Union's shop steward.

[29] Employees Connelly, Jr. and Connelly, Sr.

On these facts the Board found (A. 46):

> [T]hat the Respondent's conduct in the circumstances of this case would naturally inhibit its employees' desire to cooperate with the Board's investigative efforts and deter others from so cooperating. Backed by its economic power and in the context of other serious unfair labor practices, as in this case, an employer's request for statements given to the Board may be interpreted by the affected employees as an order with the consequent invasion of their Section 7 rights. *Bayliner Marine Corporation*, 215 NLRB No. 11, and cases cited therein.[30]

We show below that President Gleason's request for the pretrial statement of each and every Union member employed by him violated Section 8(a)(1) of the Act in the circumstances of this case.

An employer who questions employees about the contents of their pretrial affidavits given to the Board or who requests that they obtain copies for the employer violates Section 8(a)(1) of the Act unless he shows that the information is necessary in preparation for trial. See *N.L.R.B. v. General Stencils, Inc.*, 438 F.2d 894, 898 (C.A. 2, 1971); *Henry I. Siegel Co. v. N.L.R.B.*, 328 F.2d 25, 27 (C.A. 2, 1964); *Texas Industries, Inc. v. N.L.R.B.*, 336 F.2d 128, 133 (C.A. 5, 1964); *Retail Clerks International Ass'n v. N.L.R.B.*, 373 F.2d 655, 658 (C.A.D.C., 1967); *N.L.R.B. v. Ambox*, 357 F.2d 138, 141-142 (C.A. 5, 1966); *N.L.R.B. v. Winn Dixie Stores, Inc.*, 341 F.2d 750, 753 (C.A. 6, 1965), cert.

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30 In *Bayliner Marine Corporation*, the Board, Member Kennedy dissenting, explicitly stated its position that "the need to insure the confidentiality of [employees' pretrial] statements coupled with their eventual availability after the employee's testimony does not, in our view, unduly limit the scope of the attorney's pretrial preparation." Slip opinion at pp. 4-5; 87 LRRM 1450, 1451 (1974).

denied, 382 U.S. 830. The rationale for the above decisions holding that requests for the pretrial statements of employees are coercive is set forth in the following language of the Board (143 NLRB at 849-850), approved and quoted by the Sixth Circuit in *Winn Dixie, supra:*

> Pre-trial statements taken by the General Counsel are intended to record and preserve the facts leading to the alleged unfair labor practices on which the charge is based. As such, these statements necessarily reveal the employees' attitudes, activities, and sympathies in connection with the Union. Moreover, the statements divulge the union sympathies and activities of other employees and the conduct of the supervisors toward the Union and its adherents. As such, they should be as free of any inquisitive interest by the Employer as are the employees' union activities themselves. Knowledge by the employee that his Employer is manifesting an interest in what the employee may say about him can only exert an inhibitory effect on the employee's willingness to give a statement at all or to disclose all of the matters of which he has knowledge for fear of saying something that might incur the Employer's displeasure and possible reprisal. Accordingly, we are of the opinion that the Respondent's requests for copies of employees' statements to the General Counsel constitutes interference, restraint and coercion within the meaning of Section 8(a)(1) of the Act.

Moreover, the potential for inhibitory effect is increased where, as here, the requests are made in a context of other unfair labor practices and an absence of assurances against reprisal. See *King Louie Bowling Corp.*, 196 NLRB 390, 392 (1972), enforced, 472 F.2d 1192 (C.A. 8, 1973).

In various other contexts, the courts have upheld the Board's refusal to disclose to party respondents the contents of pretrial or investigatory affidavits until or unless an employee is called as a witness at a Board

hearing.[31] The reason for the Board's policy is to preserve the confidentiality of such pretrial statements. Employees are understandably reluctant to give information to Board agents because they feel that disclosure might forfeit the good will of their supervisors and lessen their job security or employment opportunities. *Texas Industries v. N.L.R.B., supra,* 336 F.2d at 133. "[I]f an employee knows that statements made by him will be revealed to his employer, he is less likely, for fear of reprisal, to make an uninhibited and nonevasive statement." *N.L.R.B. v. Golden Age Beverage Company,* 415 F.2d 26, 34 (C.A. 5, 1969). See also, *N.L.R.B. v. Beech Aircraft Corporation,* 483 F.2d 51, 56 (C.A. 10, 1973). An employee's reluctance to give information and sign statements may be overcome, however, by assurances that his statements will be held confidential and will not be disclosed unless and until he is called as witness at a Board hearing. Thus, as the Seventh Circuit has stated: "Confidentiality of employee affidavits may well be necessary to preclude employer retaliation." *N.L.R.B. v. Vapor Blast Mfg. Co.,* 287 F.2d 402, 406-407 (C.A. 7, 1961), cert. denied, 368 U.S. 823.

Gleason has not shown any specific need for the statements here requested which justifies a demand for such statements in advance of trial. To the extent that any part of any employee's sworn statement may be relevant if he later becomes a witness, the Board's Rules and Regulations, Series 8, (29 C.F.R.) Section 102.118, provide that a respondent may obtain the statement at that time. And, as the District of Columbia Circuit has indicated, at the trial, the employer "may if circumstances warrant, obtain a continuance to meet surprise testimony." *Retail Clerks v.*

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[31] See, *e.g., Intertype Co. v. N.L.R.B.,* 401 F.2d 41, 45 (C.A. 4, 1968), cert. denied, 393 U.S. 1049; *N.L.R.B. v. National Survey Service, Inc.,* 361 F.2d 199, 206 (C.A. 7, 1966); *Raser Tanning Co. v. N.L.R.B.,* 276 F.2d 80, 81-83 (C.A. 6, 1960), cert. denied, 363 U.S. 830; *N.L.R.B. v. Clement Bros. Co., Inc.,* 407 F.2d 1027, 1031 (C.A. 5, 1969).

N.L.R.B., supra, 373 F.2d at 658. Gleason appears to be asking indirectly for a broad pretrial discovery procedure. However, as this Court has specifically held, there is no right to discovery in Board proceedings. *N.L.R.B. v. Interboro Contractors, Inc.*, 432 F.2d 854, 856-857 (C.A. 2, 1970), cert. denied, 402 U.S. 915. See also, *Electromec Design & Development Co. v. N.L.R.B.*, 409 F.2d 631 (C.A. 9, 1969).

President Gleason's blanket request for each of his employees' entire pretrial statements clearly went beyond the necessities for trial preparation. Gleason could adequately prepare its defense by questioning the employees about specific, relevant topics without seeking to obtain their statements. For an employer has the right to interview employees for the purpose of discovering facts within the scope of a Board complaint so long as he does not go beyond the necessities of trial preparation and employs proper safeguards to minimize as much as possible the coercive impact of his actions upon his employees. See *N.L.R.B. v. Winn Dixie Stores, supra,* 341 F.2d at 753; *Surprenant Mfg. Co. v. N.L.R.B.*, 341 F.2d 756, 762-763 (C.A. 6, 1965); *Texas Industries v. N.L.R.B., supra,* 336 F.2d at 133; *Amalgamated Clothing Workers of America v. N.L.R.B.*, 424 F.2d 818, 825 (C.A.D.C., 1970). Cf. *N.L.R.B. v. General Stencils, Inc., supra,* 438 F.2d at 899 and cases there cited. But the request for an employee's statement is not the equivalent of questioning him about information relevant to the complaint in a Board proceeding. Pretrial statements may well include information of union sympathies and activities of the interviewed employee as well as others which are not relevant to the trial. A request for the entire statement amounts to interrogation which extends beyond the privileged purpose. Such a broad request tends to reveal union matters outside the scope of the complaint and to inhibit

other employees from fully cooperating with the Board in vindicating statutory rights.[32]

Gleason asserted before the Board that there was no proof that its attempt to secure the pre-trial statements actually intimidated its employees in this case. However, the test in determining whether conduct violates Section 8(a)(1) of the Act is not whether specific employees were in fact coerced but whether an employer's conduct has the tendency to coerce employees. *E.g., Elastic Stop Nut Corp. v. N.L.R.B.*, 124 F.2d 371, 377 (C.A. 8, 1944), cert. denied, 323 U.S. 722; *N.L.R.B. v. Illinois Tool Works*, 153 F.2d 811, 814 (C.A. 7, 1946). As we have shown above, an employer's request for pre-trial affidavits of his employees has "an inhibitory effect" on the willingness of employees to make such statements and otherwise fully cooperate with Board agents in their efforts to vindicate statutory rights. Indeed, this Court in *N.L.R.B. v. General Stencils, Inc., supra*, 438 F.2d at 898, held that the employer violated Section 8(a)(1) of the Act by questioning an employee about his prehearing statement even in circumstances where the employee's "testimony does not suggest that he felt himself subject to coercion – indeed he apparently had no qualms in indicating to [his employer] that he had told the Board the truth." However, the Court continued, in the absence of a legitimate employer interest "an order condemning such questioning without proof of effect is . . . justified" (*Id.* at 898).

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[32] Gleason's reliance before the Board on the Court's opinion in *W.T. Grant v. N.L.R.B.*, 337 F.2d 447, 449 (C.A. 7, 1964) is misplaced. That case, in which the Seventh Circuit refused to uphold a Board finding of a violation in the request for pretrial affidavits, is distinguishable on its facts. There, unlike here, the employer requested the employee to mail a copy of the affidavit directly to the employer's attorney, a procedure approved by the Board in *Atlantic & Pacific Tea Co.*, 138 NLRB 325 (1962). When the employer approached the employees he either showed them or read counsel's letter requesting the statement and he assured the employees that management officials would "not in any way examine the statement." Indeed, the Seventh Circuit distinguished *Texas Industries, supra*, on this basis.

Gleason's further contention before the Board that it requested rather than demanded employee cooperation in seeking copies of the statements and that the employees' action was thus "voluntary" is unavailing. Whether Gleason's conduct be characterized as a "request" or a "demand," the inhibitory effect of the inquiries on employees who have given, or will in the future be called upon to give, pre-trial statements is the same. For an employee who has an interest in retaining the good will of his employer could hardly refuse to comply even with a request. As the Fifth Circuit stated in rejecting a similar contention, "A refusal in such circumstances would be tantamount to an admission that the statement contained matter which the employee wished to conceal from his employer." *Texas Industries v. N.L.R.B., supra,* 336 F.2d 128 at 133. Cf. *N.L.R.B. v. Gissel Packing Co.,* 395 U.S. 575, 617 (1969) (the Board "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear").

Gleason's reliance on *Robertshaw Controls Co., Lux Time Division v. N.L.R.B.,* 483 F.2d 762 (C.A. 4, 1973) is misplaced. As the Board stated (A. 46-47) that case is clearly distinguishable:

> There the Court carefully distinguished a long line of Board and court cases supporting our position herein, pointing out that in *Robertshaw* the request for statements was in the context of very minor unfair practices, involving a small number of employees, and that there was no wholesale investigation by the Board of anti-union activities on the part of the company. The Court concluded that the request in that case did not violate Section 8(a)(1) of the Act because of its "particular and somewhat unusual facts." The instant case squarely meets the court's criteria for finding that, in cases, as here, where extensive unfair labor

> practices are alleged, an employer's request that its employees provide it with copies of statements given to the Board violates Section 8(a)(1) of the Act.

In *Robertshaw*, the employer's counsel had prepared a talk and drafted a form letter to be presented to the handful of employees involved for their consideration should the employees wish to assist their employer. Each employee was explicity told that his employment "would not be adversely affected in any way" if he refused to cooperate, and was further told that he would not be "rewarded in any way" for his cooperation, 483 F.2d at 766 and n. 7.

In contrast, here, Gleason's requests for the statements were made in the context of serious unfair labor practices; the requests were made of all employees in the unit; the employees were not told that their statements were needed for trial preparation; and Gleason gave no assurances against reprisal and made no other attempt to minimize the coercive impact of the requests upon employees. Indeed, President Gleason himself called each employee into his office individually, suggesting an "atmosphere of unnatural formality" – an element which contributes to employee restraint. Cf. *N.L.R.B. v. General Stencils, supra,* 438 F.2d 899. Accordingly, the Board's finding that Gleason violated Section 8(a)(1) of the Act by requesting its employees to procure copies of their Board statements is clearly supported by substantial evidence. Gleason's request for the statements were particularly offensive because, as the Board has stated in a similar case, *King Louie Bowling Corp., supra,* 196 NLRB 390, 392 (1972), enforced, 472 F.2d 1192 (C.A. 8, 1973):

> . . . [the employer] failed to give the employees any assurances against reprisals, and because his instructions to procure copies of the statements occurred in an atmosphere . . . which was tainted by the [employer's] expressed hostility to the protected rights of its employees [footnote omitted].

III. THE BOARD PROPERLY APPROVED THE SETTLEMENT STIPULATION IN NOS. 75-4045 AND 75-4047 NOTWITHSTANDING THE COMPANIES' OBJECTIONS

As set forth in the Statement, *supra*, pp. 10-11, in Nos. 75-4045 and 75-4047, Gleason and Garlick, another funeral home, filed charges with the Board alleging that the Union's conduct during the October 1973 strike and lockout was violative of the Act. Shortly before the scheduled hearing in the case, the Union and the Board's General Counsel entered a formal settlement stipulation, subject to Board approval, providing for entry of Board and Court orders remedying the alleged misconduct and also containing a non-admission clause. After full consideration of Gleason's and Garlick's objections, the Board approved the stipulation settling their charges against the Union.

A. Introduction

It is well-settled that the unfair labor practice prohibitions of Section 8 are but a means to the statutory end of preventing labor disputes from obstructing the free flow of commerce. *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 362-363 (1940); *N.L.R.B. v. O.C.A.W.*, 476 F. 2d 1031, 1035 (C.A. 1, 1973). Thus, by enacting Section 8, Congress did not create a "private right of action" or "private administrative remedy" for victims of the proscribed conduct. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 268-269 (1940); *Local 282, I.B.T. v. N.L.R.B.*, 339 F.2d 795, 799 (C.A. 2, 1964). Rather, Congress intended that the Board, acting in the public interest, would prosecute unfair labor practice charges in a manner calculated to achieve and preserve industrial harmony. *Amalgamated Utility Workers v. Consolidated Edison Co., supra*, 309 U.S. at 264-265; *Concrete Materials, Inc. v. N.L.R.B.*, 440 F.2d 61, 67 (C.A. 5, 1971). The courts have therefore repeatedly held that when a charging party's demand for full litigation of his

unfair labor practice allegations conflicts with the Board's determination that the statutory purpose is better served by formal or informal settlement, the private interests must give way.[33] *Local 282, I.B.T. v. N.L.R.B., supra,* 339 F.2d at 799; *I.L.G.W.U., Local 415-475 v. N.L.R.B.,* 501 F.2d 823, 832 (C.A.D.C., 1974); *N.L.R.B. v. O.C.A.W., supra,* 476 F.2d at 1036; *Concrete Materials, Inc. v. N.L.R.B., supra,* 440 F.2d at 67-68.

It is similarly well recognized that the statutory purpose is frequently better served by settlement than by full litigation of an unfair labor practice allegation. *Local 282, I.B.T. v. N.L.R.B., supra,* 399 F.2d at 799; *N.L.R.B. v. O.C.A.W., supra,* 476 F.2d at 1034. Thus, settlement has been termed the "lifeblood of the administrative process" (Final Report, Attorney General Comm. on Admin. Procedure, Sen. Doc. No. 8, 77th Cong., 1st Sess., p. 35) and its effectuation is of "manifest importance" in the administration of the Act. *Poole Foundry & Machine Co. v. N.L.R.B.,* 192 F.2d 740, 742 (C.A. 4, 1951), cert. denied, 342 U.S. 954 (1952). See also, *N.L.R.B. v. Newspaper and Mail Deliverers' Union,* 192 F.2d 654, 656 (C.A. 2, 1951). As the Supreme Court noted with approval in *Wallace Corp. v. N.L.R.B.,* 323 U.S. 248, 253-254 (1944):

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[33] While a charging party may not unilaterally block a proposed settlement, its interests are carefully protected throughout the Board's settlement procedure. Thus, the Board's Rules and Regulations, Series 8 (29 C.F.R.) Section 101.9(c), provide that a charging party may submit written objections to a proposed formal settlement to the Regional Director, the General Counsel, and the Board; if the proposed settlement is approved, the charging party is entitled to a written statement of the reasons for approval. If the Board enters an order upon a settlement stipulation, the charging party may obtain judicial review pursuant to Section 10(f) of the Act. Furthermore, other courts have held that a charging party must be afforded an evidentiary hearing on material issues of disputed fact presented by its objections as well as a presentation on the record of the reasons for settlement. *N.L.R.B. v. O.C.A.W., supra,* 476 F.2d at 1036-1037 and cases cited therein. But see, *Local 282, I.B.T., v. N.L.R.B., supra,* 339 F.2d at 799-801.

"To prevent disputes . . . the Board has from the very beginning encouraged compromises and settlements." The Board's Field Manual, Section 10124.1, further articulates the importance of resolving disputes short of litigation:[34]

> Settlement of a meritorious case is the most effective means to improve relationships between the parties and to permit the Board to concentrate its decisional activities in other cases, thereby expediting all case action. The expenditure of funds in connection with the formal stages of a case and the effect of the passage of time upon the effectiveness of the Board accomplishing the objectives of the Act dictate that the achievement of voluntary remedial action be given high priority and that complete and diligent effort be exerted to achieve the settlement of the greatest possible number of meritorious cases.

As the Board noted,(A. 160-162 n. 1, 150-151), the relevant considerations in determining whether to approve a settlement were set forth in *Farmers' Co-Operative Gin Association*, 168 NLRB 367 (1967):

> In considering settlements, the Board must weigh such factors as the risks involved in protracted litigation which may be lost in whole or in part, the early restoration of industrial harmony by making concessions, and the conservation of the Board's resources. Moreover, the Board must evaluate the legal and factual merits disclosed by the administrative investigation to determine whether the allegations of violations in the complaint can be so clearly proved that no remedy, less than the maximum, can be accepted.

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[34] The relative importance of the settlement process is underscored by the fact that in fiscal 1974 the Board closed 6,870 cases by formal or informal settlement agreements; settlements thus accounted for 86 percent of all meritorious cases closed during the year. NLRB 39th Annual Report, Appendix Tables 7 and 7a, pp. 210-212.

These considerations were explicitly approved in *Local 282, I.B.T. v. N.L.R.B., supra,* 339 F.2d at 799, where this Court held that the Board, after balancing the competing factors, could properly settle cases over the charging party's objections. Furthermore, the Board's determination that a settlement best effectuates the policies of the Act, calling, as it does, upon the exercise of its informed discretion, is entitled to judicial affirmance absent a clear showing that such discretion has been abused. *Concrete Materials, Inc. v. N.L.R.B., supra,* 440 F.2d at 68-69. See *Amalgamated Local Union 355 v. N.L.R.B.*, 481 F.2d 996, 1006-1008 (C.A. 2, 1973); *Lipman Motors, Inc. v. N.L.R.B.*, 451 F.2d 823, 828-829 (C.A. 2. 1971). As shown below, the Company has made no such showing in the present case.

B. The Companies' objections do not warrant rejection of the settlement.

Gleason and Garlick do not here contend that they were denied an opportunity to object to the settlement, that their objections were not considered, or that the Board's order does not enjoin each unfair labor practice alleged in the complaint against the Union. Nor could Gleason and Garlick successfully press such contentions. Their objections were presented to the Administrative Law Judge both orally and in writing, and then were repeated before the Board. That the objections were carefully weighed and considered is demonstrated in the detailed analysis by the Administrative Law Judge and the written opinion of the Board (A. 148-159, 160-162 n. 1).

Gleason's and Garlick's basic objections as the settlement are two-fold: first, that the stipulation contains a non-admission clause whereby the Union does not admit to the commission of any unfair labor practices, and second, that the stipulation does not provide the unusual remedy of

backpay from the Union for employees who were allegedly restrained and coerced from working during the course of conduct in question. As we show below, these objections clearly do not warrant rejecting the settlement stipulation.

1. The Non-Admission Clause[35]

Gleason and Garlick objected to inclusion of the non-admission or exculpatory clause on two grounds: a) General Counsel's own Internal Instructions and Guidelines Section 10130.6 instructs his staff that such clause "not be routinely incorporated in either formal or informal settlement agreements" since it "reduces the effectiveness of the settlements by permitting the respondents to disavow responsibility for the conduct which in fact gave rise to the proceedings"; and b) The Regional Director's inclusion of the clause was "arbitrary and capricious" since no discernible criterion or standard exists for inclusion or exclusion of a non-admission clause.

As the Board noted (A. 152), it is well established that the General Counsel, who has "final authority . . . in respect of the investigation of charges and issuance of complaints" (Section 3(d) of the Act), necessarily has broad discretion respecting settlements of unfair labor practice proceedings. See, *e.g., Local 282, Teamsters, supra,* 339 F.2d at 799. "The Board, itself, has no power to enter into settlement negotiations . . . although it can and does review the terms of a proposed settlement once a complaint has been issued. . . ." *Gimbel Brothers, Inc.,* 100 NLRB 870, 886 (1952). See, *I.L.G.W.U., Local 415-475 v. N.L.R.B., supra,*

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35 This Court is presently considering a claim that the inclusion of a non-admission clause in a Board settlement agreement constitutes a valid basis for rejection of the settlement. *Containair Systems Corporation v. N.L.R.B.,* No. 74-2098, argued on March 31, 1975.

501 F.2d at 827, 832. In independently reviewing the proposed settlement, the Board is, of course, not bound by the General Counsel's instructions to his staff nor the criteria, if any, that he has established. Cf. *N.L.R.B. v. Birdsall Construction Co.*, 487 F.2d 288, 291-292 (C.A. 5, 1973). The Board's standard test for determining acceptance or rejection of a proferred settlement in any given situation is whether "the unfair labor practices [assumed in the case] are substantially remedied" and whether the settlement "would effectuate the policies of the Act." *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957), enf'd., *N.L.R.B. v. Robinson Freight*, 251 F.2d 639, 642 (C.A. 6, 1958). See also cases cited *supra*, pp. 36-39.

It is likewise well established that the Board possesses both the authority and the expertise to determine the appropriate remedy for an unfair labor practice. As the Supreme Court held in *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 216 (1964):

> [Section 10(c)] "charges the Board with the task of devising remedies to effectuate the policies of the Act." *Labor Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 346. The Board's power is a broad discretionary one, subject to limited judicial review *(Ibid.)*. "[T]he relation of remedy to policy is pecularly a matter for administrative competence. . . ." *Phelps-Dodge Corp. v. Labor Board*, 313 U.S. 177, 194. "In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience." *Labor Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 346. The Board's order will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. Labor Board*, 319 U.S. 533, 549.

Accord: *Amalgamated Local Union 355 v. N.L.R.B., supra,* 481 F.2d at 1006-1008; *Lipman Motors, Inc. v. N.L.R.B., supra,* 451 F.2d at 828-829.

It is clear that inclusion of a non-admission clause in a settlement agreement is not a valid basis for rejection of the agreement where the settlement effectuates the policies of the Act. Indeed, such clauses are frequently incorporated in settlement agreements and the Board's decision to accept settlement stipulations containing such language has received explicit judicial approval. *I.L.G.W.U., Local 415-475 v. N.L.R.B., supra,* 501 F.2d at 832; *N.L.R.B. v. O.C.A.W., supra,* 476 F.2d at 1037; *N.L.R.B. v. I.B.E.W., Local Union 357,* 445 F.2d 1015, 1017 (C.A. 9, 1971). See *Local 282, I.B.T. v. N.L.R.B., supra,* 339 F.2d at 798. Board orders entered upon settlement stipulations containing non-admission clauses have repeatedly been enforced by this Court. See, *e.g., N.L.R.B. v. New York Local Union 10, International Brotherhood of Production, Maintenance and Operating Engineers,* Docket No. 74-1990 (C.A. 2, July 25, 1974); *N.L.R.B. v. Furriers Joint Council, Amalgamated Meat Cutters and Butcher Workmen,* Docket No. 74-1966 (C.A. 2, July 19, 1974); *N.L.R.B. v. Local 295, I.B.T.,* Docket No. 74-1631 (C.A. 2, June 26, 1974); *N.L.R.B. v. Blouse, Shirt and Sportswear Workers Union Local 23-25, I.L.G.W.U.,* Docket No. 74-1602 (C.A. 2, May 7, 1974). As the Board here stated (A. 153), "inclusion of such clause may mean nothing more than a harmless means of permitting a respondent to save face – without impairing the salutary statutory objective of amicably resolving disputes without resort to formal proceedings." Cf. *Art Metals Construction Co. v. N.L.R.B.,* 110 F.2d 148, 151 (C.A. 2, 1940); *N.L.R.B. v. Express Publishing Co.,* 312 U.S. 426, 438-439 (1941); *J.P. Stevens & Co. v. N.L.R.B.,* 380 F. 2d 292, 304-305 (C.A. 2, 1967), cert denied, 389 U.S. 1005.

Moreover, as the Board further noted (A. 153-154), there is no showing here that inclusion of the exculpatory language impairs the effective implementation of the Act. The Board's order here effectively remedies the complaint allegations by enjoining the alleged unfair labor practices and by requiring the Union to post the appropriate notices. In addition, the Board's order contained in the stipulation is a "broad" one, requiring the Union to cease and desist from coercing not only Gleason's and Garlick's employees but also those of "any other employer" and not only through the acts and conduct alleged but also "in any other manner" violative of Section 7 of the Act.

Furthermore, as the Board indicated (A. 154), the presence of the non-admission clause is of little legal import in view of the Union's consent of the proposed order by court judgment. Inclusion of the non-admission clause does not limit the Court's authority to issue a contempt citation if the Union were to continue the enjoined conduct. *N.L.R.B. v. O.C.A.W., supra,* 476 F.2d at 1037. See *N.L.R.B. v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 323 (1961). Indeed, this Court recently held a union in civil contempt of an order entered upon a settlement stipulation containing a non-admission clause. *N.L.R.B. v. Local 295, I.B.T.*, Docket No. 33979 (C.A. 2, 1973).

In sum, Gleason's and Garlick's objection to the inclusion of the non-admission clause in the settlement agreement constitutes no basis for rejecting the settlement.[36]

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[36] To the extent that Gleason's and Garlick's objection to the non-admission clause is based on their concern about their employees' ability to successfully conclude civil damage suits against the Union (A. 154), such objection is totally without merit. As the Board noted (A. 154-155), "there is no requirement that the Board, or for that matter the taxpayers of this nation, provide such services free of charge upon request of private litigants. *Concrete Materials, Inc. v. N.L.R.B., supra,* 440 F.2d at 68."

2. The Backpay Remedy

Gleason and Garlick also objected to the settlement stipulation because it does not provide backpay for the employees allegedly prevented from working because of the Union's conduct. We show below that this unusual remedy runs contrary to the Board's long-standing policy against such awards in this type of case, that said policy has recently been reaffirmed by the Board with court approval, and that in any event, in the case at bar, the requested remedy would be particularly inappropriate and thus the Board has clearly not abused its discretion by refusing to provide such a remedy here.

Initially, as we have said, the "relationship of remedy to policy is peculiarly a matter of administrative competence" and that the Board is allowed wide discretion in choosing remedies. *Phelps-Dodge Corp. v. N.L.R.B., supra,* 313 U.S. 177, 194 (1941); *N.L.R.B. v. Rutter-Rex Mfg. Co.,* 397 U.S. 929 (1969). In exercising this discretion in situations akin to the case at bar, the Board has consistently issued a traditional remedial order without backpay. See *Colonial Hardwood Flooring Company, Inc.,* 84 NLRB 563 (1949); *West Kentucky Coal Company,* 92 NLRB 916 (1950); *Bitner Fuel Company,* 92 NLRB 953 (1950); *Harry Griffin Trucking,* 114 NLRB 1494 (1955); *International Terminal Operating Co., Inc.,* 114 NLRB 1563 (1955); *Local 983, United Brotherhood of Carpenters and Joiners of America, AFL-CIO,* 115 NLRB 1123 (1956); *Int'l Union of Operating Engrs., Local 153 (Long Construction Company),* 145 NLRB 554, 555-556 (1963); *Pacific Maritime Association,* 192 NLRB 338, 352 (1971).

The First Circuit has recently affirmed the Board's present position in a case on all fours with the case at bar. In *N.L.R.B. v. O.C.A.W., supra,* 476 F.2d 1033, the Company charged the Union with violation of

Section 8(b)(1)(A) and Section 8(b)(4)(i) and (ii)(B) of the Act; after complaint issued, the Union and the General Counsel entered a proposed settlement agreement; the Company objected to the non-admission clause and to the absence of "the admittedly unusual remedy" of backpay to employees who had been prevented from working during the strike; the Board approved the settlement and applied to the Court for enforcement; and the Company petitioned for review of the Board's order, as here. The Court, noting that the appropriate remedy for an unfair labor practice "is a matter for administrative judgment" and that the Board had a "long-standing policy" against such "unusual" awards which it had recently re-affirmed, saw "no error in enforcing what was then and still is existing Board policy" 476 F.2d at 1037.

Before the Board, Gleason and Garlick relied extensively on the Board's recent decision in *Union de Tronquistas de Puerto Rico, Local 901, etc. (Lock Joint Pipe & Co. of Puerto Rico)*, 202 NLRB 399 (1973) in support of their contention that backpay ought to be awarded here. However, an analysis of that case supports the Board's determination not to award backpay in the instant case. In *Lock Joint*, the union sought to enforce its demand for employees to refrain from working during a strike with threats of bodily injury and physical violence; employees consequently refrained from working and lost wages. The Administrative Law Judge recommended that backpay be awarded against the union *not* as a normal remedy for obstructing ingress to the work site, but as an extraordinary remedy where four cease and desist orders previously entered against the same union in other Board cases within a 2-year period had apparently been totally ignored. 202 NLRB at 407. Reversing the Administrative Law Judge and rejecting his recommended order, the Board stated that it was adhering to its prior decisions which "have stood the test of 24 years of Court litigation and Congressional scrutiny," that the

extension of backpay liability to the *Lock Joint* situation "involves important considerations going to the heart of the right to strike under Sections 7 and 13 of the Act" and that "adequate remedies under the Act other than backpay exist to prevent the occurrence of violence without interfering with the right to strike."[37] 202 NLRB at 399. As the Board noted (A. 156-157), Gleason's and Garlick's attempt to distinguish *Lock Joint* from the case at bar on the basis that *Lock Joint* involved picket-line violence is a distinction without substance; if anything, this case, which involves much less serious union misconduct, is an even stronger case than *Lock Joint* for withholding the backpay remedy.

Finally, it should be noted that the case at bar is not a typical picket-line misconduct case. Here, the employees whose backpay Gleason and Garlick are pursuing were initially prevented from working, not by the Union's misconduct, but rather by the employers' lockout. It was only in response to the employers' unlawful requirement of resignation from the Union as a condition of returning to work (see *supra*, pp. 17-19), that the Union took the action which is the subject of the settlement agreement here. Thus, as the Board noted (A. 155), if the Board's finding is substantiated in the lockout case, as we have urged *supra*, pp. 14-27, the Gleason employees will be entitled to recover from Gleason the backpay Gleason now seeks to obtain from the Union. In these circumstances, the absence of the backpay remedy at issue here does not warrant disapproval of the settlement agreement.

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[37] The Board included among the available remedies (1) private suits by employees for damages for tortious union conduct; (2) a Board cease-and-desist order and injunction action against the Union under Section 10(j) of the Act, implemented by contempt proceedings; and (3) withholding issuance of an otherwise appropriate bargaining order for the benefit of the offending union. 202 NLRB at 399-400.

In conclusion, there is no reason to believe that, after incurring the expense, delay, and risks inherent in full litigation, the General Counsel could have obtained any additional relief not already provided by the present Board order. As Judge Friendly noted in *Local 282, I.B.T. v. N.L.R.B., supra,* 339 F.2d at 799: "The policy of the Act . . . requires that the Board be recognized as empowered to determine when the possibly slight merit of a charge is outweighed by the sure and speedy concessions, the industrial harmony restored, and the savings of Board resources which a settlement can achieve." Accordingly, we submit that the Board was not required here to seek either an admission or an unusual backpay remedy and thus did not abuse its discretion in determining that the instant settlement agreement would best effectuate the policies of the Act.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Board's application for enforcement be granted in Case No. 75-4018, that the Board's application for enforcement on consent should be granted in Case No. 75-4045, that Gleason's and Garlick's petition for review of the Board's Order in Case No. 75-4047 should be denied, and that a judgment should issue enforcing the Board's orders in full.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. MARTIN A. GLEASON, INC. AND GUTTERMAN FUNERAL HOME, INC., Respondents.	No. 75-4018
**********	
NATIONAL LABOR RELATIONS BOARD, Petitioner, v. LOCAL 100, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, Respondent.	No. 75-4045
**********	
J.N. GARLICK FUNERAL HOMES, INC., AND MARTIN A. GLEASON, INC., Petitioner, v. NATIONAL LABOR RELATIONS BOARD AND LOCAL 100, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, Respondents.	No. 75-4047

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D. C.

this 6th day of June, 1975.